

ORIGINAL

Erik F. Stidham (ISB No. 5483)
efstidham@stoel.com
G. Rey Reinhardt (ISB No. 6209)
grreinhardt@stoel.com
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Fax: (208) 389-9040

Scott J. Kaplan, Pro Hac Vice
sjkaplan@stoel.com
Darian A. Stanford, Pro Hac Vice
dastanford@stoel.com
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
Telephone: (503) 224-3380
Fax: (503) 220-2480

Attorneys for Defendant InterDent Service
Corporation

U.S. DISTRICT COURT
U.S. BANKRUPTCY COURT
DISTRICT OF IDAHO

APR - 5 2004

____ M. REC'D ____
LODGED _____ FILED _____

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE
CORPORATION, a Washington
corporation,

Defendant.

INTERDENT SERVICE
CORPORATION, a Washington

Case No. CV-03-450-E-LMB

ISC'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
AGAINST PLAINTIFF'S CLAIMS

ISC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST
PLAINTIFF'S CLAIMS - Page 1

Portland3-1476369.1 0021164-00081

94

corporation,

Counterclaimant,

v.

POCATELLO DENTAL Group, P.C., an
Idaho professional corporation; DWIGHT
G. ROMRIELL, individually; LARRY
MISNER, JR., individually; PORTER
SUTTON, individually; ERNEST
SUTTON, individually; GREGORY
ROMRIELL, individually; ERROL
ORMOND, individually; and ARNOLD
GOODLIFFE, individually,

Counterdefendants.

LARRY R. MISNER, JR., individually,

Counterclaimant,

v.

INTERDENT SERVICE
CORPORATION, a Washington
corporation,

Counterdefendant.

LARRY R. MISNER, JR., individually,

Crossclaimant,

v.

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Crossdefendant.

InterDent Service Corporation ("ISC") submits the following reply in support of its motion for summary judgment.

I. The Pocatello Dental Group (the "Group")'s First Claim (Declaratory Judgment) Is Moot

The Group concedes that the original pretext under which it filed this case, a supposed need to employ Dr. Dwight Romriell until the end of 2003, is now moot. Instead it makes two arguments beyond the pleadings to avoid summary judgment as to its first claim: (1) that there is a live controversy surrounding the employment of two other dentists, Dr. Eric Johnson and Dr. Larry Bybee (even though Dr. Johnson and Dr. Bybee are never mentioned in the Group's complaint) and (2) that Dr. Dwight Romriell remains entitled to any net collections for his professional services rendered before he left the Group and that a declaratory judgment is somehow essential to his ability to be paid. Neither argument demonstrates a live controversy.

First, the Group's assertion that there is a present dispute regarding the employment of Dr. Johnson is pure fiction—there is no such dispute. Dr. Johnson submitted a December 3, 2003 resignation letter in which he indicated that he would leave the Group February 27, 2004 to pursue other interests. (Affidavit of Bruce Call ¶ 2, Ex. 1.) ISC subsequently requested that Dr. Johnson stay until March 12, 2004, and Dr. Johnson agreed. (*Id.* ¶ 3.) ISC has never, as the Group asserts, "rejected" an extension for Dr. Johnson and "insisted that Dr. Johnson leave on March 15, 2004". (*Id.*) To the contrary, ISC requested that Dr. Johnson stay.

Nor is there any dispute whatsoever regarding Dr. Bybee. No request has been made to the Joint Operations Committee to approve rehiring Dr. Bybee. (*Id.*) More significantly, in two conversations with ISC regional manager, Bruce Call, on March 16 and 19, 2004, Dr. Bybee never once expressed an interest in continuing to practice with the Group. (*Id.*) Instead, they discussed arrangement for his leaving the practice. (*Id.*)

A party may not manufacture an issue outside the pleadings in order to defeat summary judgment. Fed. R. Civ. P. 56(c) requires a "genuine issue as to any material fact". *Matsushita Electric Industrial Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed2d 538 (1986) (no genuine issue for trial exists where the record as a whole could not lead a rational trier of fact to find for the nonmoving party.")

As to the Group's second argument, the Group has introduced no evidence that ISC has refused to pay Dr. Romriell what he is owed. This is because ISC has paid Dr. Romriell what he is entitled to, including 38% of any net collections for his professional services that have come in after January 1, 2004, when Dr. Romriell left the Group, nor is there any dispute that Dr. Romriell will continue to be paid what, if anything, he is owed. (Call Aff. ¶ 5.)

Even if there were a dispute as to Dr. Romriell's pay, such dispute would have no relevance for the Group's first and third requests for declaratory relief that "paragraph 5.2(b) of the Management Agreement is invalid and unenforceable" (first request for declaratory relief) and that ISC's failure to recognize the 2003 Employment Agreement with Dr. Romriell "constitutes a material breach of the Management Agreement" (third request for declaratory relief). (Complaint ¶ 21.) These requests remain moot regardless of the (nonexistent) "dispute" about payments to Dr. Romriell. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute.")

II. The Group's Second Claim (Breach of Contract) Is Moot

The Group alleges that its breach of contract claim is not moot because, "[w]hile injunctive relief is no longer necessary * * * there is still a question as to the Group's damages". However, the Group's complaint requested only injunctive relief in connection with its second

claim. (Complaint ¶¶ 22-27 and Prayer.) Paragraph 27 of the complaint states, "The Group is entitled to restrain and enjoin InterDent's breaches of the Management Agreement."

To the extent that the Group does assert claims for damages, such claims arise from its fourth cause of action (breach of contract) and are for damages "[a]fter the effective date of [ISC's] Chapter 11 plan". The Group cannot now claim that there is a question about damages other than injunctive relief when injunctive relief was the only relief they requested. Since the Group admits that "injunctive relief is no longer necessary", the claim is moot.

III. The Group's Third Claim (Injunctive Relief) Is Moot

The Group admits that this claim, which is essentially a more factually-detailed version of its second claim, is moot.

IV. The Group's Fourth Claim (Breach of Contract) Is Precluded by *Res Judicata*

The Group's demonstrates a misunderstanding of the concept of *res judicata*. "Res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties from relitigating all issues connected with the action that were or could have been raised in that action." *Rein v. Provident Financial Corporation*, 270 F.3d 895, 898-99 (9th Cir. 2001). There are four factors: (1) parties that are identical or in privity, (2) a court of competent jurisdiction rendered the earlier judgment, (3) the earlier judgment was final and (4) the same claim or cause of action was involved in both suits. *Id.* at 899.

The Group cannot dispute the applicability of the first three elements. The parties are identical, the U.S. Bankruptcy Court for the Central District of California is a court of competent jurisdiction, and the Bankruptcy Court's approval of ISC's Bankruptcy Plan and the Group's Stipulation on October 8, 2003 constitutes a final judgment. *In re Dominelli*, 820 F.2d 313, 316-

17 (9th Cir. 1987) (judicially approved settlement is final judgment on merits). The Group merely contests the fourth element.

In deciding whether the same claim is involved in separate suits, the court examines four factors: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second suit, (2) whether substantially the same evidence is presented, (3) whether the two suits involve infringement of the same right and (4) whether the two suits arise out of the same transaction or nucleus of facts. *Rein*, 270 F.3d at 903.

Prosecution of the Group's second suit would impair rights established in the first.-
ISC's Bankruptcy Plan, approved by the Bankruptcy Court, provides that

"[T]he distributions and rights that are provided in the Plan shall be in complete satisfaction, discharge and release, effective as of the Effective Date, of all Claims, whether known or unknown, against liabilities of, Liens on, obligations of, rights against and interests in the Debtors, or any of their assets or properties *** including but not limited to, Claims and Interests that arose before the Confirmation Date" (See Affidavit of Scott Kaplan ¶ 4, Ex. 3 at 90.)

More significantly, in the Group's Stipulation, it withdrew its claims and objections and acknowledged that the Management Agreement could be assumed by ISC and that no prepetition cure payments were due. (Chhina Aff. ¶ 11, Ex. G.) The Group stipulated that there was no default requiring a cure. Now, it wants to argue that the same conduct that was not a default prior to confirmation somehow becomes a default post-confirmation. It may not do so. 11 U.S.C.A. § 1141(a); *Crown v. Klein Bros.*, 121 Idaho 942, 829 P.2d 532, 540 (Ct. App. 1991) (plaintiff's claims barred by *res judicata* because plaintiff "had the capacity to present their entire controversy before the bankruptcy court".)

As detailed below, regarding elements 2-4, the Group could have asserted or actually asserted such claims prior to October 3, 2003. *Res judicata* therefore applies.

A. Failing “to include in dentists’ compensation the share of interest charged in patient accounts”

The Group asserted this claim in the Bankruptcy action. (See the Group’s July 25, 2003 Bankruptcy Claim (the “Bankruptcy Claim”), page entitled “Itemization” (second page) (attached as Exhibit 1 to the Affidavit of Darian Stanford ¶ 2) (noting “Unpaid interest collected on patients [sic] accounts”).)

B. Failing “to deposit accounts receivable in an account approved by the Group”

On May 16, 2003, the Group made this demand to ISC. (See previously filed Affidavit of James Price dated February 9, 2004, Ex. A., submitted with Plaintiff’s Objection to Defendant’s Motion and Application for a Temporary Restraining Order.) The Group renewed this demand on June 3, 2003. (*Id.* at Ex. C.)

C. Failing “to pay the claims and obligations of the Group”

The Group raised this specific claim in its Objection to ISC’s Bankruptcy Plan. (See previously filed Affidavit of Scott Kaplan In Support of Defendant and Counterclaimant ISC’s Motion for Summary Judgment ¶ 5, Ex. 4 at 10). The Group also specifically mentioned this issue in its Bankruptcy Claim (Stanford Aff. ¶ 2 at 2).

D. Interfering “with the Group’s practice of dentistry”

On May 16, 2003, as the Group admitted in its previously filed Plaintiff’s Objection to Defendant’s Motion and Application for a Temporary Restraining Order (at p. 10), this claim includes the Group’s claim for failure to provide necessary supplies, which the Group asserted in the bankruptcy action (*see* discussion below). In fact, the Group’s counsel made an argument relating to ISC “interfer[ing] with the dentist-patient relationship” in May 2003. (See previously filed Price Aff., Ex. A. at p. 2.)

E. Failing "to hire and train all non-dentists personnel needed to operate the practice"

In its previously filed Plaintiff's Objection to Defendant's Motion and Application for a Temporary Restraining Order (at pp.10-11), the Group argues that "ISC *continues* to maintain staffing levels below the percentages stated in the dentists' employment agreements and at levels that are inadequate for the efficient and effective operation of the practice." (Emphasis added.) Such language indicates that the Group could have asserted this claim earlier.

F. "[C]harging paid time off * to dentists as direct wages"**

Generally, the Group has taken the position that the arrangement with ISC's predecessor beginning in 1996 "worked fairly well until a few years ago, when ISC moved in". (See previously filed [Plaintiff's] Memorandum In Support of Motion for Temporary Restraining Order, Order to Show Cause, and Preliminary Injunction at 2.)

G. Failing "to maintain practice as the preeminent group practice in the Pocatello and surrounding area"

The Group actually asserted this claim in its Objection (*see* previously filed Kaplan Aff. ¶ 5, Ex. 4 at 2). It also asserted this issue in its Bankruptcy Claim. (Stanford Aff. ¶ 2, Ex. 1 at 2 (noting "Failure of Debtor to provide equipment and supplies necessary to maintain practice of Group as preeminent practice in area").)

H. Failing "to provide and maintain equipment and supplies necessary for the efficient and effective operation of the practice"

As detailed in ISC's Memorandum in Support of Summary Judgment, the Group raised this specific claim in its Objection. (*See* previously filed Kaplan Aff. ¶ 5, Ex. 4 at 9-10). It also raised the issue in its Bankruptcy Claim. (Stanford Aff. ¶ 2, Ex. 1 at 2 and Ex. C (noting "Failure of Debtor to provide equipment and supplies necessary to maintain practice of Group as preeminent practice in area").)

I. Failing "to provide an experienced manager"

Barbara Henderson, the allegedly inexperienced manager, was promoted to manager on or around May 2003. (Call Aff. ¶ 6.) In its previously filed Plaintiff's Objection to Defendant's Motion and Application for a Temporary Restraining Order (at p. 12), the Group argues that ISC fired Dan Horrocks in May 2003 and replaced him with "Barbara Henderson, who had no experience in dental practice management."

J. Failing "to provide financial statement and accounting records"

On June 3, 2003, the Group's counsel represented to ISC that "the Group has unsuccessfully attempted over the years to obtain an accounting from InterDent. Demand is hereby made for a full and detailed accounting...." (Affidavit of James Price dated February 9, 2004, Ex. C at 3).

K. Denying "access to patients' records"

Generally, the Group has taken the position that the arrangement with ISC's predecessor beginning in 1996 "worked fairly well until a few years ago, when ISC moved in". (See previously filed [Plaintiff's] Memorandum In Support of Motion for Temporary Restraining Order, Order to Show Cause, and Preliminary Injunction at 2.)

L. Violating "laws and public policy related to the practice of dentistry"

ISC assumes that the Group is referring to its contention that Joint Operations Committee approval of hiring dentists somehow constitutes the unlawful practice of dentistry. The Group's counsel made this assertion on June 3, 2003, during the pendency of the bankruptcy proceedings. (See Affidavit of James Price dated February 9, 2004, Ex. C at 1 ("Whether the JOC has the legal authority to address the disagreements is highly questionable.")) Also, the papers filed by the Group in obtaining its ex parte state court TRO that began this latest litigation makes clear the

issue arose before October 3, 2003. (*See e.g.* Affidavit of Dwight D. Romriell dated October 9, 2003, ¶¶ 11-13, Exs. C, D (issue arose in August 2003); Affidavit of L.R. Misner dated October 6, 2003 ¶¶ 11-13 (issue arose in August 2003), Ex. E at 2 (September 19, 2003 letter from Mr. Price asserting “[t]he Joint Operations Committee cannot legally make decisions regarding the practice of dentistry, including the hiring of providers, because all of its members are not licensed to practice dentistry in Idaho....[the Management Agreement] impermissibly grants unlicensed persons authority over professional matters.”))


V. Even If the Court Does Not Dismiss the Group’s Fourth Claim, The Group Admits That It Is Only Entitled To Damages That Accrued After October 3, 2003, Thus Entitling ISC to Partial Summary Judgment on This Issue

The Group acknowledges that it is only seeking damages that accrued after October 3, 2003, the date that ISC’s Bankruptcy Plan went into effect. There is no dispute between the parties as to this issue entitling ISC, at a minimum, to partial summary judgment.

VI. Conclusion

The Group concedes that ISC is entitled to summary judgment against any claim for damages prior to October 3, 2003, when ISC’s Bankruptcy Plan was confirmed by the Bankruptcy Court. As detailed above, ISC has shown that it is entitled to summary judgment against the Group’s other claims as well.

DATED this 5th day of April, 2004.


By: Erik F. Stidham ISB No. 5483
G. Rey Reinhardt, ISB No. 6209
Scott J. Kaplan, Pro Hac Vice
Darian A. Stanford, Pro Hac Vice

STOEL RIVES LLP
Attorneys for ISC

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **ISC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF'S CLAIMS** on the following named person(s) on the date indicated below by

- " mailing with postage prepaid
- " hand delivery
- " facsimile transmission
- " overnight delivery


to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

Gary L. Cooper
Ron Kerl
James P. Price
COOPER & LARSEN
151 N. 3rd Avenue, Ste. 210
PO Box 4229
Pocatello, ID 83205-4229
Phone: (208) 235-1145
Fax: (208) 235-1182

Lowell N. Hawkes
Law Office of Lowell N. Hawkes, Chtd.
1322 East Center
Pocatello, ID 83201
Phone: (208) 235-1600
Fax: (208) 235-4200

Richard A. Hearn
Stephen J. Muhonen
PO Box 1391/Center Plaza
Pocatello, ID 83204
Phone: (208) 232-6101
Fax: (208) 232-6109

DATED: this 5th day of April, 2004.



Erik F. Stidham ISB No. 5483
G. Rey Reinhardt, ISB No. 6209

ISC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF'S CLAIMS – Page 11